THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

Gail Page, Francine Philippe and Douglas Ponusky

v.

City of Concord

06-E-226

ORDER

The petitioners, Gail Page, Francine Philippe, and Douglas Ponusky, appeal the decision of the City of Concord Zoning Board of Adjustment (the "ZBA") granting the intervenor, Whispering Heights, LLC's, request for a variance from certain requirements of the City of Concord Zoning Ordinance (the "ordinance"). The Court held a hearing on the petitioners' appeal. Upon review of the parties' arguments, the pleadings, and the applicable law, the Court finds and rules as follows.

Factual and Procedural History

The intervenor is a limited liability company formed to develop a 271.52-acre tract of land (the "property") located adjacent to Portsmouth Street and Curtisville Road in Concord, New Hampshire. As such, the intervenor submitted a proposal to the City seeking to construct a cluster subdivision on the property. The proposal submitted to the City, however, failed to allocate sufficient "open space" as required under Article 28-4, Section 7(g)(1) of the City's ordinance. Due to the lack of compliance with the ordinance, the City denied the intervenor's proposal. The intervenor then applied to the ZBA, seeking a variance from the open space requirements of the ordinance. A hearing was held by the ZBA on May 3, 2006, following which the intervenor's request for a variance from the provisions of Article 28 of the ordinance

was granted. The petitioners in this case, homeowners residing in close proximity to the proposed development, filed a request for a rehearing with the ZBA arguing that the intervenors had failed to meet the minimum requirements for the granting of a variance and that the ZBA's decision was unlawful and unreasonable. The ZBA denied the petitioners' request for rehearing and this appeal followed.

Legal Standard

The ZBA's findings of fact are presumed to be prima facie lawful and reasonable and the ZBA's decision will be set aside only when a Court is persuaded by the balance of probabilities that it is unlawful or unreasonable. RSA 677:6 (2006); see also Korpi v. Town of Peterborough, 135 N.H. 37, 39 (1991). "[T]he burden of proof shall be upon the party seeking to set aside any order or decision of the zoning board of adjustment or any decision of the local legislative body to show that the order or decision is unlawful or unreasonable." RSA 677:6 (2006).

Arguments

As a preliminary matter, the Court notes that the intervenor has asserted the petitioners' lack standing to bring the instant suit. The petitioners object, claiming that as residents living in the general area of the proposed development they have standing to appeal the ZBA decision because they will be adversely affected by the lack of open space and increased traffic in the area. Petitioner Ponusky additionally represented at the hearing that his home is located on Portsmouth Street, and that while it does not abut the intervenor's property, he can see the driveway of the proposed development from his kitchen window.

"The pertinent statutes plainly limit standing to appeal a decision of an administrative official concerning enforcement of a zoning ordinance [to] . . . "persons aggrieved." Goldstein v. Town of Bedford,

> To demonstrate that [they are] "person[s] aggrieved," the p[etitioners] must show some direct definite interest in the outcome of the proceedings. Standing will not be extended to all persons in the community who might feel that they are hurt by a local administrator's decision. Whether a party has a sufficient interest in the outcome of a planning board or zoning board proceeding to have standing is a factual determination in each case.

Goldstein, (internal quotations, citations, and brackets omitted). In this case, the Court finds that the petitioners' interest in the outcome of this proceeding is questionable. Nevertheless, because of the proximity of Petitioner Ponusky's home to the subject property, the Court will consider the merits of the petitioners' claims.

The petitioners argue that the ZBA's decision to grant the intervenor a variance for the property was unreasonable and unlawful for several reasons. Specifically, the petitioners argue that the granting of the variance violates the spirit and intent of the ordinance by allowing development of the land without a counterbalancing preservation requirement of a block of contiguous buildable open space ("CBOS"). Moreover, the petitioners contend that the ZBA's findings fail to include written conclusions on all five of the criteria for a variance, and that the ZBA failed to include findings relative to a use variance. The petitioners further assert that the intervenor's proposal for the property inaccurately reflected the wetlands measurements, and that the variance should be voided on that basis. The Court addresses each argument in turn.

1. Whether the Granting of the Variance Violates the Spirit and Intent of the Ordinance by Allowing Development of the Land without a Counterbalancing Preservation Requirement

The petitioners first argue that the granting of the variance is contrary to the spirit and intent of the ordinance, in that it allows development of the property without a requirement for preservation of a block of CBOS. The provision of the ordinance at issue in this case, Article 28-4, Section 7(g)(1), states in pertinent part:

> A minimum of forty (40) percent of the required common open space in a Cluster Development shall be comprised of buildable land which may be used for recreational and utilitarian purposes as provided in this section. A minimum of one-half (1/2) of the common open space that is comprised of buildable land, shall be contiguous, shall be accessible from a public or private road, and shall have no horizontal dimension which is less than fifty (50) feet. Furthermore, such common open space that is comprised of contiguous buildable land shall not be less than ten thousand (10,000) square feet in the area, and where such land exceeds one (1) acre in area, the minimum horizontal dimensions of such land shall be increased by fifty (50) feet for each additional acre, or portion thereof.

Both parties agree that this ordinance becomes problematic when applied to larger developments. Specifically, it is undisputed by the parties that:

> [i]n applying this ordinance (the 50-foot rule) to a development larger than 140 acres it was discovered that it creates an unforeseen consequence. The block of CBOS becomes larger than was intended by the authors of the ordinance. In this cluster development on 271 acres, 60% or 162.6 acres must be left as open space, 40% or 65.04 acres of that land must be buildable land and 50% of that buildable land or 32.52 acres must be contiguous open space. Since the CBOS in this case is over one acre, then the 50-foot rule requires that those acres have a minimum dimension on a side of 1650 feet. This creates a parcel of approximately 62 acres, doubling the number of CBOS that was needed prior to applying the 50-foot rule.

Pets. Trial Memo. at I (B). While the petitioners concede that the provisions of the ordinance are flawed with respect to parcels of land over 140 acres in size, they nevertheless argue that a variance allowing development of the land without a requirement that some portion of the land be preserved as a block of CBOS, runs contrary to the spirit and intent of the ordinance. Specifically, the petitioners argue that while it was reasonable for the ZBA to grant the intervenors a variance from the preservation requirement of the 62-acre block of CBOS that was created by the 50-foot rule of the ordinance, the ZBA acted unreasonably when it failed to require the intervenors to comply with a minimal preservation requirement of a 32-acre block of CBOS.

The intervenors object, arguing that absent the 50-foot requirement of the ordinance, which the parties agreed created an absurd result, there is no requirement in the ordinance that a block of CBOS be preserved. Moreover, the intervenors argue that due to the nature of the particular

property, including its wetlands and steep slopes, a requirement of a 32-acre block of CBOS would not be feasible, and that its request for a variance from the 50-foot rule encompasses its need to preserve the CBOS in a form other than a block or square shape. The City of Concord further maintains that notwithstanding the variance granted regarding the 50-foot rule, the intervenor's application remains subject to Planning Board approval–including approval of all plans for the allotment of contiguous open space under the ordinance, and a final determination of whether the property satisfies the requirements for a cluster subdivision.[1]

Here, the ZBA determined that by granting a variance from the 50-foot rule, and by allowing the CBOS requirement to be met by land that is not in block shape, the spirit and intent of the ordinance was not violated. Specifically, the ZBA concluded that "the arguments as to whether this is a cluster development or not, I think is not ours to make. It gets made by the Planning Board, whether they've met all the other requirements. The only thing they're asking for is relief from this formula which seems ill-conceived." Certified Transcript, Doc. 9 at 25. The ZBA further opined that "if the requirements [have been met] . . . as far as providing the sufficient percentage of open space land [with] a sufficient percentage that's buildable, even though it is not in a square, it is contiguous, that it seems to meet the spirit of the ordinance." Id.

In this case, the ZBA determined, based on the flawed requirement in the ordinance and the amount of land allotted for preservation in the intervenor's plan, that the spirit and intent of the ordinance was not violated by granting a variance from the 50-foot rule. It is well-settled law that the Court may not substitute its judgment for the Town's and that the Court may not act as a "super zoning board." Thomas v. Town of Hooksett, 153 N.H. 717, 724 (2006). As such, the Court cannot conclude, based on the record, that such a decision was unreasonable or

[1] Article 28-4, Section 7(g)(1), is a provision relative to "Cluster Developments." These developments have specific standards, including open space requirements, which differentiate them from a Grid Subdivision.

unlawful.

2. Whether the ZBA Findings Failed to Include Written Conclusions on all Five of the Criteria for a Variance, and Whether the ZBA Failed to Include Findings Relative to a Use Variance

The petitioners next argue that the ZBA failed to issue written conclusions on all five of the criteria for an area variance, and further, that the requested variance should have been analyzed using the standards for a use variance rather than an area variance. Although the intervenors assert that the petitioners failed to properly raise an argument concerning the type of variance at issue, the Court finds that the petitioners argued in their petition for rehearing that the criteria for a use variance had not been considered. As such, the Court finds this was a sufficient assertion by the petitioners that the improper standard had been utilized. Thus, the Court will consider the argument on its merits.

In Boccia v. City of Portsmouth, 151 N.H. 85 (2004), the New Hampshire Supreme Court distinguished between use and area variances in terms of unnecessary hardship. The Boccia Court held that, when an applicant seeks an area variance, the following factors should be considered in the hardship calculation: "(1) whether an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property; and (2) whether the benefit sought by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance." Harrington v. Town of Warner, 152 N.H. 74, 78 (2005).

When an applicant seeks a use variance, however, a different standard, as set forth in Simplex Technologies v. Town of Newington, 145 N.H. 727 (2001), applies.

> To establish unnecessary hardship for a use variance, an applicant must show that: (1) the zoning restriction as applied interferes with the applicant's reasonable use

> of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others.

Harrington, 152 N.H. at 78. The petitioners in this case argue that the ZBA failed to correctly identify the type of variance at issue. Accordingly, the Court will consider whether the variance sought by the intervenor was a use or an area variance.

The differences between a use and an area variance were detailed by the New Hampshire Supreme Court in Harrington, and are as follows:

> A use variance allows the landowner to engage in a use of the land that the zoning ordinance prohibits. Use variances pose a greater threat to the integrity of a zoning scheme because the fundamental premise of zoning laws is the segregation of land according to uses.
>
> An area variance is generally made necessary by the physical characteristics of the lot. In contrast to a use variance, an area variance involves a use permitted by the zoning ordinance but grants the landowner an exception from strict compliance with physical standards such as setbacks, frontage requirements, height limitations and lot size restrictions. As such, an area variance does not alter the character of the surrounding area as much as a use not permitted by the ordinance.
>
> The critical distinction between area and use variances is whether the purpose of the particular zoning restriction is to preserve the character of the surrounding area and is thus a use restriction. If the purpose of the restriction is to place incidental physical limitations on an otherwise permitted use, it is an area restriction. Whether the variance sought is an area or use variance requires a case-by-case determination based upon the language and purpose of the particular zoning restriction at issue.

152 N.H. at 78-79.

Here, nothing in the record suggests that subdivision of the intervenor's property was not a permitted use. Indeed, testimony at the ZBA hearing pointed out that the intervenor could have opted to develop a grid subdivision, which, unlike a cluster subdivision, is not subject to the stringent requirements for preservation of the land. Certified Transcript, Doc. 9 at 20. Because subdivision is a permitted use of the property in question, and because the question before the

ZBA was whether a variance should be granted based, in part, on the physical characteristics of the property, the Court finds that the ZBA properly applied the standard for an area variance.

As to whether the ZBA erred when it did not make specific findings on each of the criteria for an area variance, the Court finds that "[a]lthough disclosure of specific findings of fact by a board often facilitate judicial review, the absence of findings, at least where there is no request therefor, is not in and of itself error." Pappas v. City of Manchester, Zoning Bd. of Adjustment, 117 N.H. 622, 626 (1977). "There must, however, be sufficient evidence before the board to support a favorable finding on each of the statutory requirements…." Barrington East Cluster I Unit Owner's Assoc. v. Town of Barrington, 121 N.H. 627, 630 (1981).

As the Pappas Court articulated, failure to specify factual findings is not in itself an error. It is only error where a party has requested such findings. In this case, the petitioners do not assert that at any point prior to the ZBA's decision it made a request for specific findings on the variance criteria. Rather, the petitioners seem to challenge the sufficiency of the ZBA's deliberations on the variance request, and question whether all five variance criteria were considered. Because the petitioners did not request specific findings, this Court's review is based on whether there was sufficient evidence to support a favorable finding on each variance criteria. In this case, a representative for the intervenor presented ample evidence on the record as to each of the five criteria supporting an area variance. Based on this information, the Court finds that the ZBA could reasonably and lawfully have found that each of the criteria for the variance were sufficiently met.

3. Whether the ZBA Erred in Concluding the Intervenor's Proposal for the Property Accurately Reflected the Wetlands Measurements

The petitioners argue that the intervenor inaccurately reflected the wetlands on its

proposed plans for the property, and that the ZBA made its findings based on those inaccurate representations. As such, the petitioners assert that the variance granted to the intervenor should be voided. In contrast, the intervenor argues that it obtained a wetlands permit for the property and that the wetlands were properly represented to the ZBA.

The Court finds that because the ZBA was presented with a wetlands permit issued for the subject property, and because the ZBA considered that permit to be factually sufficient to evidence the wetlands on the property, it did not act unreasonably or unlawfully with regard to that issue.

In light of the foregoing, the Court AFFIRMS the decision of the ZBA. The Court notes that the parties have submitted requests for findings of fact and rulings of law. The Court's findings and rulings, however, are set forth in its narrative discussion above. Therefore, the parties' requests are GRANTED to the extent that they are consistent with this order; otherwise, they are DENIED. See Geiss v. Bourassa, 140 N.H. 629, 632-33 (1996).

So ordered.

March 9, 2007
DATE

Carol Ann Conboy
Presiding Justice